



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KAJIADO**

**ELC MISC APPLICATION NO. 18 OF 2020**

**LUCY MUTHONI MUTURI.....APPLICANT**

**VERSUS**

**DANIEL TOWETT MISOL.....1<sup>ST</sup> DEFENDANT**

**MARY CHEPKURUI.....2<sup>ND</sup> DEFENDANT**

**RULING**

What is before Court for determination is the Applicant's Notice of Motion application dated the 27<sup>th</sup> July, 2020 brought pursuant to sections 13(1) & (2), 16A (1) & (2) and 19(1) & (2) of the Environment and Land Court Act; Sections 1A, 1B, 3A, 63 (e) & 95 of the Civil Procedure Act, Rules 42 (6) (2) & 51 (1) of the Civil Procedure Rules as well as Article 48, 50 and 159 (2) (d) of the Constitution. The Applicant seeks for stay of execution of the judgement and decree and all consequential orders in Kajiado Chief Magistrates Court ELC Case No. 230 of 2018 pending hearing as well as determination of the intended Appeal. She further seeks for an extension of time to enable her lodge and serve Memorandum of Appeal against the entire judgement and decree of the Chief Magistrates' Court at Kajiado (the Hon. SM Shitubi CM) dated and delivered on 22<sup>nd</sup> January, 2020 in ELC Case No. 230 of 2018.

The Application is premised on the grounds on the face of it and the supporting affidavit of LUCY MUTHONI MUTURI where she confirms that on 22<sup>nd</sup> January, 2020 the trial court delivered its judgment dismissing the suit with costs and allowing the 1<sup>st</sup> Respondent's Counterclaim. She claims to have instructed her Advocate to appeal against the said Judgement. Further, time for lodging the Appeal lapsed but the delay was not deliberate and inordinate. She contends that the delay in lodging the Appeal is attributed to the COVID – 19 pandemic which led to the closure of the courts countrywide. She explains that the Court declined to grant a stay of execution. Further, the Respondents will not be prejudiced for the prayer for extension of time. She insists the Appeal raises bona fide arguable grounds which merits further judicial consideration and scrutiny. Further, the intended Appeal is not frivolous and therefore cannot result to delay of the course and administration of justice. She reiterates that she intends to advance strong and arguable grounds against the findings and judgement of the learned Chief Magistrate and her said grounds have overwhelming chances of success. Further, that the Respondents can be compensated by way of costs. She is ready to deposit security for costs or to abide by any condition that the Court may set.

To oppose the Application, the Respondents filed Grounds of Opposition dated 2<sup>nd</sup> October, 2020 where they contend that the application is misconceived, bad in law, frivolous and incompetent for all purposes and an abuse of court process. They insist the Applicant offers no explanation for the delay in filing the intended appeal. They have referred to the National Council for the Administration of Justice (NCAJ) directives in respect to the Administrative and Contingency and Management to Mitigate COVID – 19 in Kenya's Justice Sector dated 15<sup>th</sup> March, 2020, 27<sup>th</sup> March, 2020 and 1<sup>st</sup> April, 2020. They insist the Application is calculated to cause a delay in this matter and deny them the ultimate enjoyment of fruits of their entitlement.

The application was canvassed by way of written submissions.

**Analysis and Determination**

Upon consideration of the instant Notice of Motion application including the supporting affidavit, Grounds of Opposition and rivaling submissions, the following are the issues for determination:

- Whether time should be enlarged to enable the Applicant lodge the Memorandum of Appeal Out of time.
- Whether the Court should grant a stay of execution pending the intended Appeal.

As to whether time should be enlarged to enable the Applicant lodge the Memorandum of Appeal Out of time.

The Applicant seeks for enlargement of time to lodge the Memorandum of Appeal. In her supporting affidavit she blames the COVID – 9 pandemic and the Court’s having downscaled their services, which application has been opposed by the Respondents. It is not in dispute that the judgement in the Chief Magistrates’ Court at Kajiado ELC Case No. 230 of 2018 was delivered on 22<sup>nd</sup> January, 2020 in the presence of the Applicant and Respondents’ Counsel. Section 79G of the Civil Procedure Act provides that: **‘ Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order: Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.’**

Further, section 95 of the Civil Procedure Act provides as follows: **‘ Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.’**

I note the judgement sought to be appealed from was delivered in January, 2020 while the Court’s downscaled their activities due to the COVID 9 pandemic in March 2020. I further note that the Applicant was represented by the same Counsel in the Lower Court and right now. Further, he filed this application on 27<sup>th</sup> July, 2020 seeking enlargement of time to lodge the Memorandum of Appeal after six (6) months from the date of the judgement. She explains that time for lodging the Appeal lapsed but the delay was not deliberate and inordinate. Further, the Appeal raises triable issues and is not prejudicial to resp. In the Case of **Dilpack Kenya Limited v William Muthama Kitonyi [2018] eKLR** the while dealing with an issue of enlargement of time to lodge a Memorandum of Appeal held as follows: **‘ an applicant seeking enlargement of time to file an appeal or admission of an already filed appeal must show that he has a good cause for doing so, since as was held in Feroz Begum Qureshi and Another vs. Maganbhai Patel and Others [1964] EA 633, there is no difference between the words “sufficient cause” and “good cause”. It was therefore held in Daphne Parry vs. Murray Alexander Carson [1963] EA 546 that though the provision for extension of time requiring “sufficient reason” should receive a liberal construction, so as to advance substantial justice, when no negligence, nor inaction, nor want of bona fides, is imputed to the appellant, its interpretation must be in accordance with judicial principles. If the appellant had a good case on the merits but is out of time and has no valid excuse for the delay, the court must guard itself against the danger of being led away by sympathy, and the appeal should be dismissed as time-barred, even at the risk of injustice and hardship to the appellant..... Section 79G of the Civil Procedure Act requires that before the Court enlarges the time for appealing the applicant must satisfy the court that he had good and sufficient cause for not filing the appeal in time. In Alibhahi Musajee vs. Shariff Mohammed Al-Bet Civil Appeal No. 283 of 1998, the Court of Appeal held that whereas the Civil Procedure Act allows for extension of time for filing appeal, if good and sufficient cause shown, failure to act does not constitute a good or sufficient cause.’**

Insofar as an Appeal is a Constitutional right. Where timelines are set and a party failed to lodge an appeal in time, it is the discretion of the court to enlarge time. However, this discretion is pegged on the Applicant providing plausible explanation to demonstrate there is a good and sufficient cause for the delay to warrant enlargement of time to lodge the Memorandum of Appeal out of time. In the current scenario while relying on the legal provisions cited above as well as associating myself with the quoted authority, Insofar as I sympathize with the Applicant, I find that there was negligence and inaction on her part to lodge the Memorandum of Appeal within the requisite time. Further, trying to blame the COVID – 19 pandemic will not do in this instance as time had lapsed to lodge the said Appeal before the Court downscaled their activities and her failure to act does not constitute a good or sufficient cause. In the circumstance, I will decline to exercise my discretion and enlarge time lodge the Memorandum of Appeal.

As to whether the Court should grant a stay of execution pending the intended Appeal. Order 42 Rule 6(2) provides that: **‘ No order for stay of execution shall be made under subrule (1) unless— (a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and (b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.’**

In the case of *Butt v Rent Restriction Tribunal* [1982] KLR 417 the Court of Appeal provided direction on how a Court should proceed to exercise its discretion in instances where a party seeks a stay of execution.

In the current scenario the Applicant seeks a stay of execution which has been vehemently opposed by the Respondent. It is not in dispute that the Respondents are on the suit land. Further, there is no appeal that has been filed against the judgement of the lower court. The Applicant avers that she is ready to adhere to any conditions the court will set. To my mind while applying the standards set in the aforementioned case to the circumstances at hand, I find that the Applicant has failed to demonstrate how she stands to suffer irreparable harm and loss and hence the stay sought is not warranted and will decline to grant it.

It is against the foregoing that I find the instant application unmerited and will dismiss it with costs to the Respondents. The orders of stay of execution of judgement and decree in Kajiado CMCC No. 230 of 2018 be and are hereby vacated.

**DATED SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 12<sup>TH</sup> DAY OF APRIL, 2021**

**CHRISTINE OCHIENG**

**JUDGE**